

IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0581

STATE OF MONTANA,

Plaintiff and Appellee,

v.

SUMMER LEE MANYWHITEHORSES,

Defendant and Appellant.

BRIEF OF APPELLANT

On Appeal from the Montana Eighth Judicial District Court,
Cascade County, The Honorable Julie Macek, Presiding

APPEARANCES:

ELI M. PARKER
Office of the State Public Defender
610 N. Woody Street
Missoula, Montana 59802-4143

ATTORNEY FOR DEFENDANT
AND APPELLANT

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOHN PARKER
Cascade County Attorney
121 Fourth Street North
Great Falls, MT 59401

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

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STATEMENT OF THE ISSUE

Whether the prosecutor's conduct at sentencing breached the State's contractual obligations to the Appellant under the plea agreement.

STATEMENT OF THE CASE AND FACTS

On June 12, 2009, Summer Lee Manywhitehorses (Manywhitehorses) entered guilty pleas to negligent homicide and tampering with physical evidence. (6/12/09 Tr. at 17:8-13.) Pursuant to a plea agreement with Manywhitehorses, the Cascade County Attorney (prosecutor) dismissed its charge of deliberate homicide against her. In regard to the State's tampering with physical evidence charge against Manywhitehorses, the prosecutor agreed to recommend the district court sentence Manywhitehorses to serve a term of twenty years in the Montana State Women's Prison concurrent to the district court's sentence on the negligent homicide conviction. *Id* at 16:14-17. To receive the benefit of that recommendation, the plea agreement required Manywhitehorses to enter guilty pleas to both negligent homicide and tampering with physical evidence. *Id* at 4:9-23. In regard to Manywhitehorses's negligent homicide conviction, the prosecutor did not agree to recommend any particular sentence to the district court. *Id* at 16:6-12. Accordingly, Manywhitehorses entered an open plea to negligent homicide in reliance upon the State's promise to recommend a twenty year

sentence on her tampering conviction and dismiss the deliberate homicide charge against her. *Id* 4:9-23.

Defense counsel and the district court proceeded to solicit from Manywhitehorses the factual basis for her negligent homicide and tampering with physical evidence convictions. *Id* at 5:12-25, 6-10:1-6. In regard to her negligent homicide conviction, Manywhitehorses failed to render sufficient aid to her son, J.M., when he went into distress on May 28th or 29th, 2008. *Id* at 5:12-13, 14:25, 15:1-11. In response to J.M.'s distress, Manywhitehorses splashed water on his face and gave him his teddy bear. *Id* at 7:23-25, 8-10:1-6. He held the teddy bear, but, at some point, worsened. *Id*. Manywhitehorses attempted to administer CPR to J.M. Manywhitehorses's daughter, C.M., stated that J.M. then appeared normal. Consequently, Manywhitehorses took J.M. to his bed and laid him down. Manywhitehorses failed to summon an ambulance. Sometime later, J.M. quit breathing. Manywhitehorses attempted to administer CPR again, but was unsuccessful in resuscitating him. At the change of plea hearing, Manywhitehorses stated that she should have called 911 and summoned an ambulance after her first CPR attempt. She acknowledged that, had she done so, J.M.'s chances of survival would have been greater. *Id*. Consequently, Manywhitehorses testified that her negligence in summoning aid caused the death of her son, J.M. *Id* at 14:25, 15:1-6.

In regard to her tampering with physical evidence conviction, Manywhitehorses hid her son's body from authorities before and after she became aware of the State's efforts to locate him, and she did so knowingly in violation of the law. *Id* at 6:1-6. When questioned by Detectives McDermott and Beluski, Manywhitehorses stated, "I started thinking, oh, my God, they're going to make it look bad on me because I did not call the ambulance right away." *Id* at 6:15-25, 7:1-2. In June, Manywhitehorses took J.M.'s body from the home and placed it in the trunk of her vehicle. *Id* at 5:19-25. When Manywhitehorses learned police were investigating her son's disappearance, she continued to hide his body from authorities. Thereby, Manywhitehorses knowingly thwarted investigation of J.M.'s disappearance before and after she learned the State was attempting to investigate and locate him. *Id* at 15:7-22.

Throughout sentencing, the State forced the district court to repeatedly admonish the prosecutor against soliciting and offering evidence for the dismissed deliberate homicide charge, rather than Manywhitehorses's negligent homicide conviction. A substantial portion of the State's deliberate homicide case relied upon allegations that Manywhitehorses physically abused J.M. These allegations were contained in the State's Amended *Just* Notice. On February 17, 2009, the State filed an Amended *Just* Notice detailing "other acts" under Mont. R. Crim. P. 404(b) that it believed demonstrated Manywhitehorses committed deliberate

homicide. (Appellant’s Ex. A at 1 ¶ 2.) The State concluded that “404(B) evidence is necessary in order to probe the full truth regarding the circumstances through which [J.M.] was murdered.” *Id* at 26 ¶ 1. The State believed “evidence of other crimes, wrongs, or acts is highly probative of the cause of death in this case because Defendant subjected [J.M.] to severe physical abuse during his short life.” *Id.* at 2 ¶ 1.

When the prosecutor solicited this evidence at the sentencing hearing, the district court interrupted, “let me stop you for a minute. Can you tell me and indicate for the record the relevance of the testimony in regards to prior allegations of abuse as it relates to the charge of negligent homicide for the failure to render aid?” (Sent. Hrg. Tr. at 21:11-15.) The prosecutor advised the district court of its wide discretion to consider any relevant evidence relating to the character of the defendant, her history, mental and physical condition, and the broad spectrum of incidents making up her background, which includes acts dismissed pursuant to a plea agreement. *Id* at 21:21-25. Specifically, the prosecutor wished to present evidence of the State’s deliberate homicide charge contained in the State’s

Amended Just Notice:

we know the Court does have the ability in this case to look at the full picture of the horrifying child abuse that this defendant rendered not only against her son that died but even against her daughter who is

still alive, and it's our hope that the Court is going to take stock of that entire picture today.

Id at 22:6-12; *See Id* at 20:14-25, 21:1-10.

The prosecutor then stated “there are a number of glaring questions in this case that pertain to the negligent homicide.” He then proceeded to summarize and list those questions:

why didn't Summer call 911 when it was very clear to her her son was failing? Number two, how did [J.M.] end up in such critical condition in the first place? The testimony we are going to seek from Dr. Wells, which we've already had on the record, indicates he was suffering severe head injuries. Number three, why did Summer conceal [J.M.]'s body for so long?

Id at 22:15-25, 23:1-2.

The prosecutor concluded “this negligent homicide happened for a reason we believe.” *Id* at 23:4-5.

At this point, the district court again objected to the prosecutor's intent to introduce evidence of deliberate homicide to support an enhanced sentence for negligent homicide: “But the problem I have with this and the concern I have is this isn't the trial This isn't a fact finding expedition for the Court to try and resolve those issues. I mean, there was an opportunity for a trial.” *Id* at 23:6-11. The district court continued: “The state charged her with two alternative offenses, one being deliberate homicide, one being negligent homicide, in the alternative. The defendant took advantage of the lesser-included charge and pled guilty to that

charge, and so the deliberate is off the table.” *Id* at 23:13-17. The district court then stated, “I can’t consider any acts of deliberate homicide.” *Id* at 23:19-20.

Directing the State to present evidence relevant to negligent homicide, the district court engaged in a lengthy discussion to explain that evidence of deliberate homicide was not relevant at Manywhitehorses’s negligent homicide sentencing. The prosecutor fervently argued that evidence of Manywhitehorses’s intentional acts of child abuse could be combined with expert testimony to demonstrate that Manywhitehorses caused the head injury that killed J.M. The prosecutor believed that Montana Supreme Court precedent allowed the district court to consider such evidence. The Court stated:

She’s here today because the state charged her with failing to give him medical aid and attention, and that’s [*sic*] what I have to sentence her for here today.

And so my concern here is that if we get down this road of trying to answer these questions, now we’re at a phase where we’re not in a trial, we’re not--she doesn’t have the protections of having a jury make the fact determination. She doesn’t have the protections of having the requirement of proof beyond a reasonable doubt. She doesn’t have the protections that she would have during that proceeding here, and so if, in fact, we’re here for purposes of sentencing the--and I’m supposed to sentence her for failing to render aid to the child, then how does this give me relevant information in making a sentencing decision for that offense?

Id at 23:22-25, 24:1-10.

The prosecutor then attempted to provide the district court a copy of *State v. Hill*, 2009 MT 134, 350 Mont. 296, 207 P.3d 307, as authority for the State to

present its evidence of deliberate homicide at Manywhitehorses's negligent homicide sentencing. The court indicated it had already thoroughly reviewed *Hill* the previous evening. The court continued:

even at the time of sentencing there's constitutional protections of due process and fundamental fairness that I have to guard, and I certainly want to protect the record in this case and make certain that I stick to, in fact, everything that's relevant to sentencing for the negligent homicide, which there's plenty that is.

Sent. Hrg. Tr. at 25:3-8.

The prosecutor responded:

It's our goal today to try to present a record of the entire picture of the child abuse that led up to the negligent homicide . . . it's our hope to lay the entire record before the Court to try to get the kind of sentence that will prevent this defendant from ever harming another child ever again

Id at 25:10-13; 25:21-23.

The prosecutor then suggested that a combination of expert testimony and evidence of Manywhitehorses's past acts of intentional child abuse could demonstrate that Manywhitehorses caused J.M.'s death:

our expert witness has previously described the symptoms [J.M.] had as being classic and symptomatic of a head injury. And we believe there's plenty of evidence of this defendant punching her child in the face to support that she may have been part of that head injury.

Id at 26:9-11.

To this, the district court again objected, "But I can't--that's speculation. I can't take that into consideration at this juncture. There's all sorts of information

here that makes this death very suspicious in nature.” *Id* at 26:12-15. The district court continued:

But the reality of it is the state had the opportunity if it chose to do so to forego this lesser alternative charge and to charge her strictly with deliberate homicide for causing the death of the child and go to trial on that and put all this evidence in front of the--of a jury and see if in fact the jury would conclude that there was sufficient evidence to find that she was responsible for the deliberate death of her child.

Now, the choices were made not to do that and to charge this in the alternative and not just to charge negligent homicide by, that she had somehow negligently inflicted death but to charge it in such a way that the charge of negligent homicide is that the negligent act that she’s accused of and has pled guilty to is that of failing to render aid to the child.

So we’re in a situation where what is relevant is the fact we have these circumstances in regards to a child that is now deceased, that the mother did not call 911, and that there are certain questions that have been left unanswered, but when the actual autopsy reports that have been conducted by two physicians both conclude that they can’t determine cause of death and that they can’t determine whether there was an intentional infliction of a cause of death or an accidental infliction of cause of death, then for the Court to now at the time of sentencing try and make some determination based on the evidence that you’re presenting to me today I think goes beyond the pale here of what is, in fact, relevant to this particular charge.

Id at 26:17-25, 27:1-19.

Accordingly, the district court determined that the State’s circumstantial evidence of deliberate homicide was irrelevant to sentencing Manywhitehorses for negligent homicide.

In response to the district court's decision, the prosecutor switched tracks to Manywhitehorses's tampering with physical evidence charge and stated, "Now, Your Honor, another way to approach this is through the lens of the evidence tampering." *Id* at 28:10-11. The prosecutor continued with a new theory:

So why did she evidence tamper? What did she have to hide? She had something to hide. Our position is she had something to hide because she had beaten him so many times that she caused him injuries, and she didn't want medical personnel to learn about it, and that's why she didn't call 911, and she didn't want the cops to find out about it, and that's why she hid his body in the car. So we think it's very germane, very transactional, and right on point with the issues at bar in this case.

Id at 29:5-13.

The district court voiced concern:

we're having evidentiary testimony in regards to items that are I think somewhat speculative here and asking me to then take those into consideration in terms of determining her sentence.

And it appears to be very, very close to the state now coming in on the back end and putting on testimony that would be pertinent to a deliberate homicide charge when the defendant has not pled to that charge.

Id at 29:5-12.

Although obligated to support the plea agreement, the prosecutor proceeded to submit the controversial evidence in relation to Manywhitehorses's tampering with physical evidence conviction.

Through Detective McDermott, the prosecutor probed Manywhitehorses's credibility and alleged history of child abuse. The prosecutor asked McDermott to "please describe what your investigation revealed about Summer trying to get her daughter . . . involved in the burial."

A. In the interview with [C.M.], she finally came around to talking about it, and she stated that once--well, first of all, she acted as a lookout outside of their house here in Great Falls, to make sure nobody was looking when her mother loaded the child up into the trunk of the car, then indicated that they went up to the area of East Glacier up near the reservation, either on or off the reservation, looking for a suitable place to bury him, and at one point she indicates that Summer had gotten mad at her and admonished her for not helping look for a suitable place and said, "I don't even know why I brought you with me, you're not even helping," to which [C.M.] a little bit later suggested a suitable spot to bury him, and Summer told her, "No, that won't do the animals will dig him up."

So and she indicated she had purchased a shovel prior going on that outing to find to bury his body.

Q. So Summer actively tried to involve her daughter who was 11 at the time of this in this makeshift burial?

A. Yes.

Q. And your investigation indicated she actually chastised her daughter for not doing enough; is that right?

A. That's correct.

Q. Can you describe that briefly for the Court?

A. Well, again she made the statement to her, you know, "I don't even know why I'm bringing you along to help out, you're not even helping me." And she had indicated they found a wooded area that Summer originally had planned for, but it had been burned down

during a wildfire season, and she got mad at [C.M.] for not actively trying to help find a safe place to bury the body, where animals would not dig up the body and then later be discovered.

Q. Did she try to enlist [C.M.] to take part as a lookout?

A. Yes.

The plea agreement bound the State to recommend the district court impose a twenty-year prison sentence upon Manywhitehorses's conviction for tampering with evidence. The prosecutor argued that evidence of Manywhitehorses's poor credibility and alleged child abuse was, nevertheless, relevant "through the lens of the evidence tampering." *Id* at 28:10-11.

Through Katherine Wells M.D. (Wells), the prosecutor continued to solicit and offer evidence of Manywhitehorses's alleged child abuse. In response to the district court questioning the relevance of the State's evidence of child abuse, the prosecutor explained, "[i]t's our goal today to try to present a record of the entire picture of the child abuse that led up to the negligent homicide" (*Id* at 25:10-13), and that "it's our hope to lay the entire record before the Court to try to get the kind of sentence that will prevent this defendant from ever harming another child ever again" *Id* at 25:21-23. When the district court questioned the relevance of "prior allegations of abuse as it relates to the charge of negligent homicide for the failure to render aid" (*Id* at 21:13-15), the prosecutor stated that such evidence would provide "the full picture of the horrifying child abuse that this defendant

rendered not only against her son that died but even against her daughter who is still alive, and it's our hope that the Court is going to take stock of that entire picture today.” *Id* at 22:8-12. Specifically in regard to Wells’s testimony, the prosecutor stated: “And our expert witness has previously described the symptoms [J.M.] had as being classic and symptomatic of a head injury. And we believe there’s plenty of evidence of this defendant punching her child in the face to support that she may have been part of that injury.” *Id* at 26:7-11.

The State offered Wells’s expert testimony to present a theory that Manywhitehorses caused the death of her son in the course of continued and ongoing child abuse.

Q. All right. Thank you, Doctor. Lastly, did you reach any conclusion regarding the injuries sustained by [J.M.] and how they related to his death, in your professional opinion and in your work as a pediatrician and a specialist in child abuse?

A. Yes, Ma’am, I did.

Q. And what was your conclusion?

A. It was my expert medical opinion that he was the victim of chronic child physical abuse including emotional abuse and neglect, which we commonly called the battered child syndrome. Further, it was my opinion that his death was very likely the result of child physical abuse given the nature of the--the nature of the presentation and what was described, and that was compounded by medical neglect and his mother’s action in seeking any medical care for him and further placing him in laundry basket in the trunk of a car, I felt really contributed to a display of true disregard for human life.

Id at 51:1-17.

Through Wells's testimony, the prosecutor developed apparent inconsistencies between injuries found during J.M.'s autopsy and Manywhitehorses's explanation that J.M.'s fatal injury was caused by a fall from his high chair. Wells stated, "in my opinion, it's exceedingly rare that that kind of short fall alone, a simple short fall, would be enough to cause the death of a child." *Id* at 50:5-8.

The prosecutor explicitly requested that Wells provide an opinion about whether Manywhitehorses's explanation of J.M.'s death was credible.

Q. All right. Thank you. Just to recap, essentially, what you're saying is that the history regarding this child as given by his mother is inconsistent with the injuries that were found during autopsy; would that be correct?

A. That is correct.

Q. And, in fact, there's no history to explain any of the injuries found, would that be correct?

A. That is correct.

Q. And you agree that that would go directly to the defendant's credibility in this case?

A. Yes.

Id at 45:21-25; 46:1-6.

Accordingly, the prosecutor presented an expert witness to testify at Manywhitehorses's negligent homicide sentencing that the factual basis for Manywhitehorses's negligent homicide conviction was false.

Defense counsel for Manywhitehorses objected to the State's presentation of Wells's testimony. When the prosecutor offered Wells as an expert witness, defense counsel stated:

Your Honor, I have no objection to her being recognized as such, but I do object to testimony along these lines again for a number of reasons. One, I believe it's speculation; two, is that I believe that this is revisiting the charging documents that support the deliberate homicide charge, which was an alternative charge to negligent homicide. I think there's bootstrapping going on here trying to make this an emotional issue, and to me the due process--process at some point's cut off under--and I will say I don't think there's any clear guidance out there that would establish one way or the other, but we see a number of members of the U.S. Supreme Court cautioning and at times saying that some of this violates--clearly violates due process, but we've found other ways to handle it.

Id at 41:4-17.

On the same grounds, defense counsel specifically objected to the prosecutor's presentation of testimony at sentencing as a violation of the plea agreement:

The objection is this, Your Honor: As far as I can see, the alleged child abuse, which we argue did not occur for the most part by our client, by my client, is--is that that would still, if anything, go towards the tampering evidence or towards deliberate homicide, so it is bootstrapping, and it would be undermining. There actually is a plea agreement in place in regard to the tampering charge, and I'm thinking the way the State is portraying this that they're saying don't follow that clearly which is a violation of the law clearly.

Nevertheless, the district court allowed the prosecutor to present the State's evidence of deliberate homicide under the State's new theory that such evidence was relevant to Manywhitehorses's sentence for tampering with evidence.

Earlier in the sentencing proceeding, the State commenced its presentation by soliciting and offering gruesome photographs of J.M.'s decomposed corpse. (*Id.* at 10:12-17:18). J.M.'s body was discovered after several months in the trunk of Manywhitehorses's vehicle, which had been impounded by the Great Falls Police Department upon Manywhitehorses's DUI arrest on July 21, 2009. *Id.*

Next, the prosecutor asked McDermott, "can you describe the odor emanating from the car?" McDermott answered,

[i]t was putrid, basically, infused throughout any location. At the police department it was--the vehicle was examined forensically in the bay area, and the entire gym area, I don't know how many square feet it is, but it's a large area, the size of a basketball court, and the entire area had to be cordoned off and sealed because of the smell of decay.

Id. at 17:17-25.

Finally, the prosecutor asked whether Manywhitehorses's daughter was "subjected to that same foul odor" *Id.* at 18:8-9. The witness answered, "the drive prior to the DUI arrest, they had to drive with the windows rolled down all the way because the smell of decomp. was so heavy within the vehicle." *Id.* at 18:10-14.

The prosecutor proceeded to solicit testimony regarding Manywhitehorses's other crimes and character for truthfulness. McDermott testified that Manywhitehorses had been dishonest in cashing J.M.'s social security checks after his death and misleading various agencies involved in the investigation of J.M.'s death.

Q. Did you identify any information about his mother cashing those checks after the time he died?

A. I did.

Q. Okay. Please describe that for the Court.

A. To give you the exact dates I'm going to refer to my report detailing the checks. Following--following the reported date of death, that being 5/29 of '08, we have one cashed the following day on 5/30 of '08, one was cashed then on 6/3 of '08, 7/1 of '08, 7/9 of '08, 8/1 of '08, and 8/29 of '08, and I'll note that two of those, the ones cashed on 6/3 of '08 and 7/9 of '08 were duplicates issued by Social Security because she reported she had not received those checks, so she actually got paid twice by the U.S. Government because she had reported not receiving those checks.

Q. So what you are saying is she reported some checks missing that weren't really missing?

A. Yes.

Q. And then she ended up cashing all the checks?

A. Yes.

Q. The original ones and the duplicates?

A. That's correct.

Q. All of those were cashed after the time [J.M.] died; is that correct?

A. That is correct.

Q. Thank you. You briefly referenced the the Youth in Need of Care investigation in this matter. Did the the Court order Summer to report [J.M.'s] whereabouts to the Court?

A. Oh, yeah. It--whether it was in court, you know, to the judge, to the caseworkers, with DPHSS, family members, friends, and then ultimately to the police when we became involved in the investigation.

Id at 18:24-25, 19:1-25, 20:1-9.

Although Manywhitehorses had already pled guilty to negligent homicide, the prosecutor solicited and offered substantial testimony to challenge Manywhitehorses's credibility. In summation, the prosecutor stated that Manywhitehorses's cashing of the social security checks was "indicative of her deceitful nature." *Id* at 60:5-6.

In its final recommendation, the State requested the district Court sentence Manywhitehorses to serve 100 years in prison for her negligent homicide conviction and twenty years concurrent for tampering with evidence. In response, the district court stated

the Court does find that the State's recommendation for 100 years on a negligent homicide charge is not commensurate with the normal penalty for this particular offense. In this Court's experience which goes back--I'm dating myself but almost 30 years, the reality here is that the sentence generally handed down in the most heinous of deliberate homicide charges wherein the defendant has been found guilty of committing an intentional act of deliberate homicide is

approximately 100 years, in many of those cases 50 to 80 years. I have never seen nor have I heard of a case in which 100 years was a sentence imposed for any type of a negligent homicide case.

Id at 75:19-25, 76:1-5.

The district court sentenced Manywhitehorses to a term of forty years in the Montana State Prison for negligent homicide and fifteen years for the offense of tampering with evidence. Both sentences run consecutively for a total sentence of fifty-five years in prison.

STANDARD OF REVIEW

In an allegation of prosecutorial error, this Court must review the prosecutor's conduct in the context of the entire proceeding. A *de novo* review is the appropriate standard under these circumstances. *State v. Rardon (Rardon II)*, 2002 MT 345, ¶ 15, 313 Mont. 321, 61 P.3d 132 (citing *United States v. Johnson*, 187 F.3d 1129, 1134 (9th Cir. 1999)).

SUMMARY OF THE ARGUMENT

The prosecutor used the plea agreement to backdoor the State's circumstantial evidence of deliberate homicide in a fervent effort to obtain an extraordinary sentence from the district court for Manywhitehorses's negligent homicide conviction. Accordingly, the prosecutor's overzealous pursuit of an extraordinary sentence resulted in breach of the State's contractual obligations to Manywhitehorses under the plea agreement. The prosecutor paid lip service to the

State's promise to recommend negligent homicide in three separate ways. First, the prosecutor offered evidence that J.M.'s death resulted from deliberate homicide, not negligent homicide. Second, the prosecutor attacked the factual basis of Manywhitehorses's negligent homicide conviction. And third, the prosecutor circumvented the plea agreement to backdoor evidence of deliberate homicide through Manywhitehorses's tampering with physical evidence conviction. Additionally, the prosecutor offered inflammatory evidence that demonstrated a clear intent to undermine the State's recommended sentence on tampering with physical evidence. Finally, this Court should remand this matter for resentencing to provide Manywhitehorses either rescission or specific performance, whichever may avoid a miscarriage of justice.

ARGUMENT

This Court has recognized that “a plea agreement presupposes fundamental fairness in the securing of the agreement between the defendant and the prosecutor. . . .” *State v. Schoonover*, 1999 MT 7, ¶ 12, 293 Mont. 54, 973 P.2d 230. “Prosecutorial violations, even if made inadvertently or in good faith to obtain a just and mutually desired end, are unacceptable.” *Rardon II*, ¶ 14 (*citing State v. Bowley*, 282 Mont. 298, 310-11, 938 P.2d 592, 599 (1997)(*citing State v. Allen*, 199 Mont. 204, 209, 645 P.2d 380, 382 (1981))). Therefore, a prosecutor who violates a plea agreement also violates a defendant's right to fundamental

fairness in the sentencing proceeding. “No principle of fairness or contract law allows the State to retain the benefit of its agreement and avoid its obligation.”

Rardon II, ¶ 18 (*citing Bowley*, 282 Mont. at 314, 938 P.2d at 601).

A plea agreement is a contract between the State and the defendant subject to contract law standards. *Hill*, ¶ 49 (Cotter, J. concurring); *Rardon II*, ¶ 18. Both prosecutors and defendants are bound by the plea agreements they make. *Hill*, ¶ 29. In regard to the State, this Court requires prosecutors to meet “strict and meticulous standards of both promise and performance” under the plea agreement. *Rardon II*, ¶ 18. Accordingly, the State may never retain the benefit of a defendant’s guilty plea while avoiding its obligations under the plea agreement. *See Rardon II*, ¶ 18 (*citing Bowley*, 282 Mont. at 314, 938 P.2d at 601). When a defendant’s guilty plea “rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” *State v. Rardon (Rardon I)*, 1999 MT 220, ¶ 14, 296 Mont. 19, 986 P.2d 424. Accordingly, a plea of guilty is “involuntary and subject to vacation” where it rests “in any significant degree on an unfulfilled plea bargain.” *Id.*

A prosecutor’s violation of the plea agreement is subject to greater scrutiny than provided under contract law standards. Even when defense counsel fails to object during a sentencing proceeding, this Court may still review for the first time

on appeal claimed errors that implicate fundamental constitutional rights. Failure to do so “may leave unsettled the question of the fundamental fairness of the trial or proceeding” *Rardon II*, ¶ 16. This Court has stated that “[b]ecause a defendant’s fundamental and constitutional rights are implicated when he is induced to plead guilty by reason of a plea agreement, our analysis of the plea agreement or a breach thereof is conducted with greater scrutiny than in a commercial contract.” *Id* (citing *United States v. McQueen*, 108 F.3d 64, 66 (4th Cir. 1997)).

Additionally, strict enforcement of a prosecutor’s obligations under the plea agreement ensures the integrity of the sentencing proceeding. When reviewing a plea agreement for plain error, this Court establishes whether the breach was “so obvious and substantial that failure to notice and correct it affected the fairness, integrity or public reputation of the judicial proceeding.” *Id*. Thereby, this Court ensures that the sentencing judge has “the benefit of making [its decision] based on a good faith and fair presentation of the State’s case.” *Rardon II*, ¶ 25.

When a prosecutor solicits and offers evidence clearly intended to undercut the plea agreement, breach of contract occurs. “A prosecutor must give more than lip service to her bargain.” *Hill*, ¶ 29. Although “there are no hard and fast criteria defining when a prosecutor has merely paid lip service to a plea agreement” (*Hill*, ¶ 29), a prosecutor must not solicit or offer evidence “that would almost

undoubtedly cause the court to question the appropriateness of the recommended sentence” and, thereby, undercut the plea agreement. *Rardon II*, ¶ 22. “Each case stands or falls on the facts unique to it.” *Rardon II*, ¶ 21. Therefore, this Court reviews the prosecutor’s conduct in the context of the entire proceeding. *Id.*, ¶ 15.

In *Rardon II*, this Court determined the prosecutor’s conduct demonstrated a clear intent to undercut the plea agreement. The prosecutor merely gave lip service to the plea agreement when he recommended the district court impose the sentence agreed upon by Rardon, but also solicited and offered inflammatory testimony from victims that disparaged the recommended sentence. *Rardon II*, ¶ 19. The prosecutor’s argument in summation listed a litany of negative aspects from Rardon’s sexual offender evaluation, stating that Rardon’s “resentment may mount into acts of brutal hostility. And as he himself has acknowledged, when he’s drinking, using drugs, he is a miserable SOB.” *Id.*, ¶ 20. Additionally, the prosecutor repeated the PSI report’s statement that “a long-term prison sentence at least over his head” would be a “motivator” toward Rardon’s rehabilitation. *Id.*

In *State v. LaMere*, 272 Mont. 355, 360, 900 P.2d 926, 929 (1995), this Court determined that the prosecutor inadequately supported the plea agreement. At sentencing, the prosecutor recommended a deferred sentence in conformity with the plea agreement. But the prosecutor also emphasized that LaMere “was an individual who spent most of his time drinking and bragging that he was going to

go out and get drunk.” The prosecutor continued to emphasize “that the PSI demonstrated that LaMere didn’t complete anything he started--he never completed school, has an education in carpentry, but doesn’t want to be a carpenter, has an alcohol problem or chemical dependency problem but admits he doesn’t want to go to treatment for that.” Predictably, the district court rejected the plea agreement and sentenced LaMere to serve ten years in the Montana State Prison, plus six months in the Cascade County Jail concurrent to LaMere’s prison sentence. The prosecutor failed to meet the “strict and meticulous standards of both promise and performance” required of the State in plea agreements. *Lamere*, 272 Mont at 359, 900 P.2d at 928. Consequently, this Court remanded for resentencing.

In *Rardon II*, this Court adopted the persuasive authority of several Washington State decisions to exemplify circumstances that constitute a prosecutor’s violation of the plea agreement. In *Washington v. Van Buren*, 49 P.3d 966 (Wash. App. Div. 2 2002), the Court of Appeals of Washington, Division Two stated that a prosecutor must act in good faith and must not undercut the plea agreement explicitly or by conduct evidencing intent to circumvent the agreement’s terms. *Van Buren*, 49 P.3d at 972. Also in *Van Buren*, the Court of Appeals of Washington, Division Two stated:

[a]ctions such as requesting that the court hold an evidentiary hearing when the necessary information is already before the court, making

unnecessary comments about written reports, aggressively questioning witnesses, underscoring aggravating factors in argument or summation, or other independent behavior contrary to the prosecutor's assertion that he or she is adhering to the recommendation, can undercut the agreement.

Id at 972 (citing *Washington v. Sledge*, 947 P.2d 1199, 1206 (Wash. App. Div. 2 1997)).

In *Sledge*, the Supreme Court of Washington determined a prosecutor undercut the plea agreement when she repeatedly solicited testimony of aggravating factors and, thereby, supported an extraordinary disposition contrary to her recommended sentence. *Sledge*, 947 P.2d at 1206. The Court of Appeals of Washington, Division Two also determined that breach occurred when a prosecutor recommended probation as promised, but expressed reservations about that sentence that tainted the sentencing process. *Matter of Palodichuk*, 589 P.2d 269 (Wash. App. Div. 2 1978).

In each case, the prosecutor's recommendation at sentencing matched the plea agreement in form, but breached the contract in performance. To determine if a prosecutor intended to undercut the plea agreement, this Court reviews the prosecutor's conduct in the context of the entire proceeding. *See Rardon II*, ¶ 15. Similarly, the Court of Appeals of Washington determines whether a prosecutor's recommendation constituted mere lip service by applying "an objective standard focusing on the effect of the prosecutor's actions rather than on subjective intent;

we review the entire sentencing record for an indication of a contradiction, by word or conduct, of the agreed recommendation.” *Van Buren*, 49 P.3d at 973. In Montana, “there are no hard and fast criteria defining when a prosecutor has merely paid lip service to a plea agreement.” *Hill*, ¶ 29. Nevertheless, the very definition of lip service requires the Court apply an objective standard that focuses upon the prosecutor’s conduct, rather than subjective intent.

A. The Prosecutor’s Overzealous Pursuit of an Extraordinary Sentence Resulted in Breach of the State’s Contractual Obligations to Manywhitehorses Under the Plea Agreement.

In this case, Manywhitehorses entered guilty pleas to negligent homicide and tampering with physical evidence in reliance upon promises made by the State and contained in the plea agreement. In exchange for Manywhitehorses’s guilty plea to tampering with physical evidence, the State promised to recommend at sentencing that the district court impose a twenty-year prison term concurrent with her negligent homicide sentence. In exchange for Manywhitehorses’s guilty plea to negligent homicide, the State agreed to dismiss its deliberate homicide charge against her. As consideration for the State’s performance of its contractual obligations under the plea agreement, Manywhitehorses waived her fundamental and constitutional rights pursuant to sentencing and pled guilty to both negligent homicide and tampering with physical evidence.

Ensuring consideration for Manywhitehorses's guilty pleas, this Court required the prosecutor meet "strict and meticulous standards of both promise and performance" at the sentencing hearing. *See Rardon II*, ¶ 18. The prosecutor had a duty to act in good faith and "not undercut the plea agreement explicitly or by conduct evidencing intent to circumvent the agreement's terms." *Van Buren*, 49 P.3d at 972 (*cited by Rardon II*, ¶ 22). The State's promises to Manywhitehorses were a significant inducement or consideration for her guilty pleas. The prosecutor was obliged to strictly and meticulously fulfill those promises. In this regard, the prosecutor failed. Consequently, this Court should determine Manywhitehorses's guilty pleas are "involuntary and subject to vacation" because they rest to a "significant degree on an unfilled plea bargain." *See Rardon I*, ¶ 14.

This Court must subject the prosecutor's performance under the plea agreement to greater scrutiny than provided under contract law standards. *See Rardon II*, ¶ 16 (*citing McQueen*, 108 F.3d at 66). Even where Manywhitehorses's defense counsel failed to object during the sentencing proceeding, this Court may review the prosecutor's numerous errors that breached the State's obligations under the plea agreement. *See Rardon II*, ¶ 16.

Additionally, the prosecutor's breach of the plea agreement was "so obvious and substantial" that failure to notice and correct shall affect the fairness and integrity of the sentencing proceeding. *See Rardon II*, ¶ 16 (*citing McQueen*, 108

F.3d at 66). Under its review of the prosecutor’s conduct, this Court ought to apply “an objective standard focusing on the effect of the prosecutor’s actions rather than on subjective intent” and “review the entire sentencing record for an indication of a contradiction, by word or conduct, of the agreed recommendation.” *See Van Buren*, 49 P.3d at 973. This Court reviews the prosecutor’s conduct in light of the entire record of Manywhitehorses’s sentencing hearing. *See Rardon II*, ¶ 15.

1. The Prosecutor Paid Lip Service to the State’s Promise to Recommend Negligent Homicide.

The prosecutor’s conduct at sentencing demonstrated a clear intent to undercut the plea agreement. *See Rardon II*, ¶ 19. This Court required the prosecutor give more than lip service to the State’s plea agreement with Manywhitehorses. *Hill*, ¶ 29. At sentencing, the prosecutor relied upon evidence the State believed would demonstrate J.M.’s death resulted from intentional acts of child abuse, rather than Manywhitehorses’s negligent failure to render aid. (Sent. Hrg. Tr. at 22:15-25, 23:1-2, 23:4-5, 25:10-13, 26:7-11, 51:1-17, 50:5-8, 45:21:25, 46:1-6.) Additionally, the prosecutor attacked the factual basis for Manywhitehorses’s negligent homicide conviction. (*Id* at 22:15-25, 23:1-5, 26:9-11.) Finally, the prosecutor circumvented the plea agreement to backdoor evidence of deliberate homicide through Manywhitehorses’s tampering with physical evidence conviction. (*Id* at 28:10-11.)

Consequently, the prosecutor paid lip service to the plea agreement, which required the State to recommend a sentence for negligent homicide in exchange for Manywhitehorses's guilty plea. The prosecutor argued that Manywhitehorses purposely caused the death of her son in the course of continued and ongoing child abuse. This Court must remand for resentencing and ensure that the sentencing judge has the benefit of determining Manywhitehorses's sentence based on a good faith and fair presentation of the State's case. *See Rardon II*, ¶ 15 (citing *Johnson*, 187 F.3d at 1134).

- a. **The prosecutor offered evidence that J.M.'s death resulted from deliberate homicide, not negligent homicide.**

At the change of plea hearing, Manywhitehorses's testimony provided the factual basis for her negligent homicide conviction. Manywhitehorses failed to render aid to her son when his condition was failing. She splashed water on his face, administered CPR, and put him to bed. When his condition worsened, she again attempted to administer CPR. He eventually died. Manywhitehorses failed to call 911 or summon an ambulance. Had she done so, J.M.'s chances of survival would have increased greatly. Consequently, Manywhitehorses's negligence caused the death of her son, J.M.

Alternatively, the State believed J.M.'s death resulted from deliberate homicide. As demonstrated by prior pleadings, the State's deliberate homicide

case against Manywhitehorses consisted largely of child abuse allegations. The State's Amended *Just* Notice set forth these allegations as "other acts" evidence, arguing "404(B) evidence is necessary in order to probe the full truth regarding the circumstances through which [J.M.] was *murdered*." (Ex. A at 26 ¶ 1(emphasis added).) The State considered this evidence to be "highly probative of the cause of death in this case because Defendant subjected [J.M.] to severe physical abuse during his short life." *Id* at 2 ¶ 1. Additionally, the State's expert witness, Wells, reported that J.M.'s death was unlikely to have resulted from the "short fall" described by Manywhitehorses.

At sentencing, the prosecutor's statements demonstrated a clear intent to offer the State's circumstantial evidence of deliberate homicide. Sent. Hrg. Tr. at 28:10-11. Through McDermott, the prosecutor first attempted to offer a portion of the State's evidence of child abuse allegations. *Id* at 20:14-25, 21:1-10. When the district court objected, the prosecutor explained that McDermott's testimony could be combined with that of Wells to demonstrate Manywhitehorses's acts of child abuse caused J.M.'s death: ". . . our expert witness has previously described the symptoms [J.M.] had as being classic and symptomatic of a head injury. And we believe there's plenty of evidence of this defendant punching her child in the face to support that she may have been part of that head injury." *Id* at 26:9-11

Finally, the prosecutor solicited and offered expert testimony that tended to establish J.M.'s death was caused by intentional acts of child abuse, rather than negligence. Wells testified at sentencing, ". . . it was my opinion that his death was very likely the result of child physical abuse" *Id* at 51:1-17. In regard to Manywhitehorses's description of J.M.'s fall from a high chair, Wells stated, ". . . in my opinion, it's exceedingly rare that that kind of short fall alone, a simple short fall, would be enough to cause the death of a child." *Id* at 50:5-8. Typifying lip service to the plea agreement, the prosecutor concluded, "this negligent homicide happened for a reason we believe." *Id* at 22:15. Arguing that J.M. died as a result of intentional acts of child abuse, the prosecutor gave lip service to the State's promise to dismiss the deliberate homicide charge and, thereby, violated the State's plea agreement with Manywhitehorses. *See Rardon II*, ¶ 21.

b. The prosecutor attacked the factual basis of Manywhitehorses's negligent homicide conviction.

At sentencing, the prosecutor expressed reserve and explicitly questioned whether J.M.'s death resulted from negligent homicide. Accordingly, the prosecutor failed to adequately support the plea agreement. *See LaMere*, 272 Mont. at 360, 900 P.2d at 929. Also, the prosecutor solicited witness testimony that attacked Manywhitehorses's credibility and, thereby, the credibility of the factual basis for her guilty plea to negligent homicide. Finally, the prosecutor

solicited the expert testimony of Wells, who directly challenged the factual basis of Manywhitehorses's negligent homicide conviction. Therefore, the prosecutor fell far short of the "strict and meticulous standards of both promise and performance" required of the State in its plea agreement with Manywhitehorses. *LaMere*, 272 Mont. at 359, 900 P.2d at 929.

The prosecutor breached the State's plea agreement with Manywhitehorses by soliciting and offering evidence "that would almost undoubtedly cause the court to question the appropriateness of the recommended sentence." *Rardon II*, ¶ 21. Insinuating J.M.'s death was likely the result of deliberate homicide, the prosecutor reminded the district court that "there are a number of glaring questions in this case that pertain to the negligent homicide" and proceeded to list three. Sent. Hrg. Tr. at 22:15-25. First, "why didn't Summer call 911 when it was very clear to her her son was failing? Number two, how did [J.M.] end up in such critical condition in the first place? . . . Number three, why did Summer conceal [J.M.]'s body for so long?" *Id* at 22:25-25, 23:1-2. Accordingly, the prosecutor demonstrated a clear intent to cause the court to question the factual basis for Manywhitehorses's negligent homicide conviction.

The prosecutor undercut the plea agreement further by raising doubt about the credibility of Manywhitehorses's account of J.M.'s death, which was the factual basis for her guilty plea to negligent homicide. The prosecutor solicited

and offered testimony from McDermott to demonstrate that Manywhitehorses was not credible. Sent. Hrg. Tr. at 18:24-25, 19:1-25, 20:1-9, 30:25, 31:1-25, 32:1-10, 60:5-6. Sharpening that point through Wells's testimony, the prosecutor inquired:

Q. All right. Thank you. Just to recap, essentially, what you're saying is that the history regarding this child as given by his mother is inconsistent with the injuries that were found during autopsy; would that be correct?

A. That is correct.

Q. And, in fact, there's no history to explain any of the injuries found, would that be correct?

A. That is correct?

Q. And you agree that that would go directly to the defendant's credibility in this case?

A. Yes.

Id at 45:21-25, 46:1-6.

In regard to Manywhitehorses's description of J.M.'s fall from a high chair, Wells stated, "... in my opinion, it's exceedingly rare that that kind of short fall alone, a simple short fall, would be enough to cause the death of a child." *Id* at 50:5-8.

By attacking Manywhitehorses's credibility, the prosecutor's conduct demonstrated a clear intent to eliminate the factual basis for negligent homicide under the plea agreement. As a result, the prosecutor undermined the plea

agreement and, thereby, rendered Manywhitehorses's guilty pleas involuntary and subject to vacation.

c. **The prosecutor circumvented the plea agreement to backdoor evidence of deliberate homicide through Manywhitehorses's tampering with physical evidence conviction.**

Finally, the prosecutor violated the plea agreement by offering evidence of alleged deliberate homicide "through the lens of the evidence tampering." *See Id* at 28:10-11. The prosecutor presented evidence that demonstrated a clear intent to undermine Manywhitehorses's negligent homicide conviction contained in the plea agreement. Additionally, the prosecutor had a duty to present evidence at sentencing in good faith to the district court and the State's obligations under the plea agreement. Specifically, the prosecutor had a duty not to circumvent the plea agreement in an effort to present evidence in support of an extraordinary sentence. Instead, the prosecutor offered evidence the district court determined was irrelevant to Manywhitehorses's negligent homicide conviction by offering that evidence through the backdoor of the State's recommended sentence on Manywhitehorses's tampering with physical evidence conviction.

The State proceeded to sentencing with two bodies of evidence, one supporting negligent homicide and one supporting deliberate homicide. Because the statutory definitions of deliberate homicide and negligent homicide contain different mental states, the State's evidence of deliberate homicide directly

contradicted its evidence of negligent homicide. Accordingly, the district court determined the State's circumstantial evidence of deliberate homicide was irrelevant to a determination of Manywhitehorses's sentence for negligent homicide. Sent. Hrg. Tr. at 23:19-20. Consequently, the prosecutor was faced with a choice: 1) offer the State's direct evidence for negligent homicide; or 2) attempt to backdoor the State's circumstantial evidence for deliberate homicide. The prosecutor chose the latter and proceeded to present the State's evidence of deliberate homicide under a pretext of relevance to Manywhitehorses's tampering with physical evidence conviction.

At face value, the prosecutor's offer of deliberate homicide evidence violated the State's promise to recommend a specific sentence on Manywhitehorses's tampering with physical evidence conviction. The prosecutor's offer of deliberate homicide evidence demonstrated a clear intent to undermine the State's recommended sentence.

If considered a pretext, the prosecutor's offer of deliberate homicide "through the lense of the evidence tampering" constituted bad faith with the district court and violated the State's obligations under the plea agreement. Consequently, the prosecutor violated the State's plea agreement with Manywhitehorses. The Court should remand for resentencing.

2. The Prosecutor Offered Inflammatory Evidence That Demonstrated a Clear Intent to Undermine the State’s Recommended Sentence on Tampering With Physical Evidence.

Similar to *Rardon II* and *LaMere*, the prosecutor provided inflammatory testimony at Manywhitehorses’s sentencing. The prosecutor violated the plea agreement by repeatedly soliciting testimony and exhibits of aggravating factors in Manywhitehorses’s tampering with physical evidence conviction. *See Rardon II*, ¶ 19, *Sledge*, 947 P.2d at 1205-06. Thereby, the prosecutor violated his duty to adequately support the State’s plea recommendation on Manywhitehorses’s tampering with physical evidence conviction. *See LaMere*, 272 Mont. at 360, 900 P.2d at 929. Additionally, the prosecutor failed to meet this Court’s “strict and meticulous standards of both promise and performance” required of the State in its plea agreement with Manywhitehorses. *Id.*, at 359, 900 P.2d at 929.

In *Rardon II*, the prosecutor improperly offered inflammatory testimony from witnesses who disparaged the State’s recommended sentence. *Rardon II*, ¶ 19. Here, the prosecutor offered witness testimony that presented the State’s case for deliberate homicide “through the lens of the evidence tampering.” Sent. Hrg. Tr. at 28:10-11. The prosecutor claimed such evidence was relevant to support the State’s recommended sentence on Manywhitehorses’s tampering with physical evidence conviction. *Id.* The prosecutor then explained the State’s theory that

linked evidence of child abuse, J.M.'s death, and Manywhitehorses's tampering with evidence conviction:

So why did she evidence tamper? What did she have to hide? She had something to hide. Our position is she had something to hide because she had beaten him so many times that she caused him injuries, and she didn't want medical personnel to learn about it, and that's why she didn't call 911, and she didn't want the cops to find out about it, and that's why she hid his body in the car. So we think it's very germane, very transactional, and right on point with the issues at bar in this case.

Id at 29:5-13.

The prosecutor was obligated under the plea agreement to support the State's recommendation on Manywhitehorses's tampering with physical evidence conviction. Instead, the prosecutor improperly offered inflammatory evidence that disparaged the State's recommended sentence. *See Rardon II*, ¶ 19.

In *Rardon II* and *LaMere*, this Court determined a prosecutor presented a litany of negative characteristics about the defendant and, thereby, failed to meet the "strict and meticulous standards of both promise and performance" required of the State in its plea agreement. *See Rardon II*, ¶ 21, *LaMere*, 272 Mont. at 359, 900 P.2d at 929. Here, the prosecutor recommended a sentence in conformity with the plea agreement, but violated the State's promises to Manywhitehorses by emphasizing aggravating factors. *LaMere*, 272 Mont at 360, 900 P.2d at 929. The prosecutor presented evidence Manywhitehorses committed deliberate homicide, defrauded the federal government, physically and psychologically abused her

children, and repeatedly lied to authorities in an effort to hide J.M.'s body.

Additionally, the prosecutor presented thirteen photographs of J.M.'s corpse and emphasized testimony in regard to the smell of its decomposition.

Through McDermott, the prosecutor solicited testimony that Manywhitehorses psychologically abused her daughter, C.M., physically abused J.M., defrauded the federal government, and repeatedly lied to authorities in an effort to hide J.M.'s body. (Sent. Hrg. Tr. at 19:3-22, 20:4-9, 20:14-25, 21:1-10, 31:2-25, 32:1-15.) Additionally, the prosecutor solicited and offered exhibit evidence of J.M.'s decomposed corpse, which emphasized aggravating factors of horror and disgust associated with Manywhitehorses's tampering with physical evidence conviction. The prosecutor's emphasis on such aggravating factors constituted a violation of the State's agreed-upon recommendation on that conviction.

The State commenced its presentation with gruesome photographs of J.M.'s decomposed corpse. Next, the prosecutor asked McDermott to "describe the odor" that surrounded Manywhitehorses's vehicle where the boy was discovered. *Id* at 17:17-18. McDermott described a "putrid" smell. *Id* at 17:19-25. The "foul smell" was so strong that an entire gymnasium had to be "cordoned off and sealed because of the smell of decay." *Id*. The prosecutor continued to inquire whether Manywhitehorses's daughter was "subjected to the same foul odor" *Id* at

18:8-9. McDermott then described C.M.’s account of driving “with the windows rolled down all the way because the smell of decomp. was so heavy within the vehicle.” *Id* at 18:10-14.

Taken alone, this aspect of the prosecutor’s presentation might constitute violation of the plea agreement. In conjunction with the prosecutor’s entire presentation, the effect is undeniable. Even without the visual aid of photographs, review of McDermott’s descriptions in the sentencing transcript causes shock and disgust in the reader. The effect of such evidence was to taint the entire sentencing proceeding and Manywhitehorses herself with the same “foul smell.”

Accordingly, the prosecutor struck an emotional chord that could sustain a sentence commensurate with deliberate homicide, rather than either of the offenses for which Manywhitehorses stood convicted.

As in *Rardon II* and *LaMere*, the prosecutor presented a litany of Manywhitehorses’s negative attributes before the district court. To summarize, the prosecutor presented evidence that Manywhitehorses was a liar, thief, child abuser, and murderer. And the prosecutor did so arguing such evidence was “germane” to the State’s recommended sentence on Manywhitehorses’s tampering with physical evidence conviction. Additionally, the prosecutor questioned the very legitimacy of the negligent homicide that the State agreed to recommend under the plea agreement. Consequently, the prosecutor’s conduct “would almost undoubtedly

cause the court to question the appropriateness” of the State’s recommended sentence on Manywhitehorses’s tampering with physical evidence conviction. *See Rardon II*, ¶ 22. The State retained the benefit of Manywhitehorses’s waiver of her fundamental and constitutional rights, but avoided its obligation under the plea agreement. Consequently, the consideration for Manywhitehorses’s guilty pleas has failed. The prosecutor breached the State’s contractual obligations to Manywhitehorses under the plea agreement. The Court should remand this matter for resentencing.

B. The Court Should Remand This Matter for Resentencing and Provide Manywhitehorses a Choice Between the Equitable Remedies of Either Rescission or Specific Performance.

This Court has addressed the defendant’s remedies when a prosecutor violates the plea agreement and the defendant’s consideration for entering a guilty plea has failed. “When consideration fails, the failure constitutes a material breach of the contract, which gives rise to the equitable remedy of rescission of the agreement.” *Hill*, ¶ 51 (Cotter, J. concurring) (*citing Norwood v. Service Distributing, Inc.*, 2000 MT 4, ¶¶ 32-33, 297 Mont. 473, 994 P.2d 25). Where the prosecutor breaches a plea agreement, the defendant may seek to withdraw her guilty plea or seek the State’s specific performance of the plea agreement. *Rardon I*, ¶ 14; *State v. Munoz*, 2001 MT 85, ¶¶ 16-18, 305 Mont. 139, 23 P.3d 922 (*citing*

State v. Persak, 256 Mont. 404, 407, 847 P.2d 280, 281-82 (1993), *Rardon I*, ¶ 13, *Santobello v. New York*, 404 U.S. 257, 263 (1971)).

The first equitable remedy identified by the United States Supreme Court in *Santobello* is “specific performance” by the State of the plea agreement.

Safeguards for the defendant’s due process rights may require in certain circumstances that “the State uphold its end of the bargain, and, before a new sentencing judge, comply with the terms and conditions of the plea agreement by recommending a specific sentence, moving for the dismissal of other charges, or simply not opposing the defendant’s requested sentence.” *Munoz*, ¶ 16 (*citing Rardon I*, ¶ 13). Additionally, the sentencing court should issue an order that provides the following: 1) a new sentencing hearing; 2) a new sentencing judge; and 3) that the State shall be represented by different prosecutors. *See Rardon II*, ¶ 26.

The second equitable remedy is “rescission.” When a prosecutor violates a plea agreement, a defendant’s rescission of the plea agreement requires she be allowed to withdraw her guilty plea and face trial on the original charges. Under rescission, the district court proceeds as if the plea agreement had never been entered. Accordingly, the defendant’s “‘performance’ is returned; i.e., his or her constitutional rights that were waived by the guilty plea are thereafter reinstated.” *Munoz*, ¶ 18. The remedy of “rescission” is an alternative remedy to the remedy of

“specific performance.” *See Persak*, 256 Mont. at 407, 847 P.2d at 281-82, *Rardon I*, ¶ 13.

Unless constituting miscarriage of justice, the defendant has a right to choose either rescission or specific performance. In *Munoz*, this Court held that, “in light of the underlying principles of contract law, a non-breaching defendant must be afforded the initial right to choose from available remedies where the State breaches the plea agreement.” *Munoz*, ¶ 38. Thereafter, the State “must bear the substantial burden, as the breaching party, of demonstrating with clear and convincing evidence that the defendant’s choice of remedy would result in miscarriage of justice.” Only if the State meets this burden may the district court, in its discretion, deny the defendant her chosen remedy. *Id.*

In this case, the prosecutor has violated the plea agreement. Consequently, the Court should remand this matter for resentencing. Upon remand, Manywhitehorses should be provided an opportunity to choose between the equitable remedies of rescission and specific performance. *Rardon I*, ¶ 14, *Munoz*, ¶¶ 16-18 (*citing Persak*, 256 Mont. at 407, 847 P.2d at 281-82, *Rardon I*, ¶ 13, *Santobello*, 404 U.S. at 263).

CONCLUSION

At sentencing, the prosecutor failed to meet the “strict and meticulous standards of both promise and performance” required by the State under the plea agreement. The prosecutor solicited and offered inflammatory evidence designed to incite the sentencing court against Manywhitehorses. The prosecutor paid lip service to the plea agreement by presenting evidence that contradicted any factual basis for negligence and undermined the State’s recommended sentence for Manywhitehorses’s tampering with physical evidence conviction. Such evidence tended to demonstrate the presence of intentional child abuse as the cause of J.M.’s death, or deliberate homicide. Additionally, the prosecutor violated the plea agreement by raising doubt at sentencing in regard to the legitimacy of the negligent homicide conviction. Furthermore, the prosecutor’s attack on Manywhitehorses’s credibility tended to eliminate any factual basis for negligent homicide and, thereby, undercut the plea agreement. Finally, the prosecutor failed to adequately support the State’s recommended sentence for Manywhitehorses’s tampering with physical evidence conviction by emphasizing the aggravating factors involved. This matter should be remanded to the district court for resentencing.

Respectfully submitted this ____ day of March, 2010.

OFFICE OF THE STATE PUBLIC DEFENDER
Region 2 – Missoula
610 North Woody
Missoula, MT 59802

By: _____
ELI M. PARKER
Assistant Public Defender

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief
of Appellant to be mailed to:

STEVE BULLOCK
Montana Attorney General
MARK MATTIOLI
Assistant Attorney General
215 North Sanders
P.O. Box 201401
Helena, MT 59620-1401

JOHN PARKER
Cascade County Attorney
121 Fourth Street North
Great Falls, MT 59401

SUMMER MANYWHITEHORSES 2106034
Montana Womens Prison
701 South 27th Street
Billings, MT 59101

DATED: _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

ELI M. PARKER

APPENDIX

Exhibit A.....State’s Amended *Just* Notice

Exhibit BSentencing Order